In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-601

WENDELL L. SHAFFER AND MARJORIE M. SHAFFER, PETITIONERS

v.

ROBERT C. WILSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioner Wendell L. Shaffer is a dentist practicing in Colorado Springs, Colorado. On October 22, 1971, special agents of the Internal Revenue Service searched petitioner's office pursuant to a warrant which had been issued by a United States Magistrate. The warrant was based upon the affidavits of three persons who had been employees of petitioner. The affidavits stated that petitioner did not record all of his receipts, that he continually bragged to his patients and employees that he cheated on his income tax returns, that he wrote checks for services never performed and then took "kickbacks," and that peti-

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tioner told an employee to overstate his expenses for supplies (Pet. App. 2a, 8a). The warrant directed the agents to search petitioner's dental office and to seize various business records relating to his dental practice income and expenses during the years 1966 through 1970 (III-R. 54).[1] The search was carried out, and the agents seized numerous records and documents (Pet. App. 2a).

Petitioners commenced this action under Rule 41(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. 1331 seeking the suppression and return of the seized documents and money damages. The district court held that the search and seizure were proper, that the search warrant met the requirements of the Fourth Amendment, and that the seizure of petitioner's business records did not violate his Fifth Amendment privilege against compulsory self-incrimination (Pet. App. B). The court of appeals affirmed, with one judge dissenting (Pet. App. A).

1. In holding that the search and seizure of petitioner Wendell L. Shaffer's business records by Internal Revenue agents pursuant to a warrant did not violate his privilege against compulsory self-incrimination, the decision below is in direct and acknowledged conflict with *Hill* v. *Philpott*, 445 F.2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. There, in a 2-1 decision, the Seventh Circuit ruled, under circumstances parallel to those of this case, that the Fifth Amendment barred federal agents from seizing

[1] "R." references are to the record on appeal in the court below.

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the business records of a dentist pursuant to a search warrant based on affidavits showing probable cause to believe that he had willfully evaded the payment of taxes. Moreover, this Court has recently granted certiorari in *Andresen* v. *Maryland,* 24 MD. App. 128, 331 A.2d 78, certiorari granted October 6, 1975 (No. 74–1646), which presents the question in the context of the seizure of the business records of an attorney charged with false pretenses and misappropriation. We therefore support the granting of the petition with respect to this issue.

2. Petitioners also argue (Pet. 11–12) that the description in the search warrant of the items to be seized lacked the specificity required by the Fourth Amendment. However, the seizure of a large amount of business records is constitutionally permissible if justified by the affidavits upon which the warrant is based. *Hamilton* v. *United States,* 433 F.2d 526, 529 (C.A. D.C.), certiorari denied *sub nom. Klein* v. *United States,* 402 U.S. 944. Moreover, when an exact description of the items to be seized is impossible, a generic class may be described. *James* v. *United States,* 416 F.2d 467, 473 (C.A. 5), certiorari denied, 397 U.S. 907 (approving a warrant for, *inter alia,* "records, sales receipts, customers' lists, shipping orders"). Accord: *United States* v. *Honore,* 450 F.2d 31, 33 (C.A. 9), certiorari denied, 404 U.S. 1048 (upholding a warrant for "articles [of] personal property tending to establish the identify [*sic*] of the persons in control of the premises * * * including but not limited to utility

company receipts, rent receipts, cancelled mail envelopes * * *"); *United States* v. *Fuller,* 441 F.2d 755, 760 (C.A. 4), certiorari denied, 404 U.S. 830 (approving a warrant for "bookmaking records * * * consisting of, but not limited to, accounting sheets, rundown sheets, betting slips, recap sheets, sports information papers, miscellaneous line notations, line sheets, books of account, checks, money orders * * *"); *United States* v. *Scharfman,* 448 F.2d 1352, 1354–1355, and 1353, n. 1 (C.A. 2), certiorari denied, 405 U.S. 919 (involving two search warrants for "* * * books, records and other fruits and instrumentalities" and "for such books and records as are being used as means and instrumentalities of the above described crimes * * *").

Here, the warrant directed the seizure of the following matter (III–R. 54):

> * * * fiscal records relating to the income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources from January 1, 1966, to December 31, 1970, including, but not limited to, dental patient cards, appointment books, cash receipts books, cash disbursements books, expense records, business ledgers, log books, bank ledger sheets and statements, deposit tickets, cancelled checks, purchase invoices, copies of receipts covering payments of fees, copies of invoices and bills sent to patients of the aforesaid Doctor, an approximately 5½" by 7" or other dimensioned, paper pad, on which various dates, names, and amounts, and other notations are recorded and allegedly known as a "cheat book," and diverse other records of financial transactions * * *.

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This foregoing statement described with more than adequate particularity the items to be seized. The warrant therefore complied with the requirements of the Fourth Amendment. Accordingly, we submit that the second question in the petition, challenging the specificity of the search warrant, does not warrant further review by this Court. To that extent, the petition should be denied.

3. Because the issue of the availability of the privilege against self-incrimination to defeat the seizure pursuant to search warrant is also presented in *Andresen* v. *Maryland, supra,* No. 74–1646, we would ordinarily confine ourselves to the filing of an *amicus* brief in *Andresen* and, if the Court deemed it appropriate, presentation of oral argument in that case. Under those circumstances, we would suggest to the Court that it hold this case and dispose of it in accordance with the decision in *Andresen.* However, the question in *Andresen* arises in a more complex context in which the seizure of a lawyer's records was pursuant to a warrant that employed the broad concluding phrase "other fruits, instrumentalities and evidence of crime at this time unknown" (see Pet. No. 74–1646, App. 35). Thus, there is an additional question in *Andresen* on which the Court has granted certiorari, as to whether the search warrant met the standards of particularity under the Fourth Amendment. We accordingly believe that, in order to insure that it will reach and resolve the important Fifth Amendment question here presented, it would be helpful for the Court also to give plenary considera-

tion to this case, in which there is no substantial claim that the seizure of evidence was in violation of the Fourth Amendment.

We therefore respectfully submit that the petition should be granted with respect to the first question, and that this case should be set for oral argument in tandem with *Andresen* v. *Maryland,* No. 74–1646.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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